

Andrew I. Silfen (*pro hac vice*)
Beth M. Brownstein (*pro hac vice*)
AREN'T FOX LLP
1301 Avenue of the Americas, 42nd Floor
New York, New York 10019
Telephone: (212) 484-3900
Facsimile: (212) 484-3990
Email: andrew.silfen@arentfox.com
beth.brownstein@arentfox.com

Aram Ordubegian (SBN 185142)
ARENT FOX LLP
55 Second Street, 21st Floor
San Francisco, CA 94105
Telephone: (415) 757-5500
Facsimile: (415) 757-5501
Email: aram.ordubegian@arentfox.com

*Counsel for BOKF, NA, solely in its capacity as
Indenture Trustee for the Utility Senior Notes*

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

- and -

PACIFIC GAS AND ELECTRIC COMPANY.

Debtors

Case No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**BOKF'S NOTICE OF APPEAL AND
ELECTION TO HAVE APPEAL HEARD BY
DISTRICT COURT CONCERNING ORDER
REGARDING POSTPETITION INTEREST**

- Affects PG&E Corporation
 - Affects Pacific Gas and Electric Company
 - Affects both Debtors

* All papers shall be filed in the Lead Case, No. 19-30088 (DM).

1 1. PLEASE TAKE NOTICE that BOKF, NA (“BOKF”) in its capacity as successor
2 indenture trustee under three Indentures dated as of (i) April 22, 2005 Supplementing, Amending
3 and Restating the Indenture of Mortgage Dated March 11, 2004; (ii) November 29, 2017; and (iii)
4 August 6, 2018, each as supplemented or amended (the “Senior Notes Indentures”), pursuant to
5 which Pacific Gas and Electric Company issued the senior notes (the “Senior Notes”), in the
6 principal amount of \$17.525 billion, hereby seeks to preserve its ability to participate in any appeal
7 from (i) the *Interlocutory Order Regarding Postpetition Interest* [ECF No. 5669] entered on
8 February 6, 2020 (the “PPI Order”) and (ii) the related *Memorandum Decision Regarding*
9 *Postpetition Interest* [ECF No. 5226] entered on December 30, 2019 (the “PPI Memorandum”).
10 Copies of the foregoing are attached hereto as Exhibit A and Exhibit B, respectively. BOKF
11 elects to have this appeal heard—if at all, as explained below and in its Cross-Motion for Leave to
12 Appeal PPI Order, filed concurrently herewith—by the U.S. District Court for the Northern
13 District of California (the “District Court”), not the Bankruptcy Appellate Panel for the Ninth
14 Circuit.

15 2. On February 20, 2020, the Ad Hoc Committee of Holders of Trade Claims (the
16 “Trade Committee”) filed its Notice of Appeal and Statement of Election to have Appeal Heard
17 by District Court [ECF No. 5844] (the “Notice of Appeal”). Thus, BOKF’s appeal is timely. *See*
18 Fed. R. Bankr. P. 8002(a)(3)(“If one party files a timely notice of appeal, any other party may file
19 a notice of appeal within 14 days after the date when the first notice was filed”). The Trade
20 Committee’s appeal has been docketed in the District Court as No. 20-cv-1493 (N.D. Cal.)
21 (Gilliam, J.). In the Notice of Appeal, the Trade Committee asserted that, pursuant to 28 U.S.C. §
22 158(a)(1), the PPI Order and PPI Memorandum are appealable as of right. In addition, the Trade
23 Committee filed, concurrently with its Notice of Appeal, a motion pursuant to 28 U.S.C. §
24 158(a)(3) for leave to appeal the PPI Order and PPI Memorandum [ECF Nos. 5845 and 5846] (the
25 “Trade Committee Motion”).¹

26
27 1 On March 4, 2020, Mizuho Bank, LTD. in its capacity as Holdco Term Loan Administrative Agent (“Mizuho”),
28 filed a cross-motion for leave to appeal [ECF No. 6060] (the “Mizuho Cross-Motion,” and together with the Trade
Committee Motion, the “Motions for Leave to Appeal”).

3. On March 3, 2020, the District Court entered an *Order* (1) *Directing Parties to Meet and Confer on Briefing Schedule for Motion for Leave to Appeal, and (2) Vacating Dates in the Initial Case Management Scheduling Order* [ECF No. 5] (the “Order”). The parties are currently meeting and conferring on the briefing scheduling for the Motions for Leave to Appeal.

4. For reasons that will be set forth in BOKF's forthcoming response to the Motions for Leave to Appeal, which will be filed in accordance with the Order and briefing schedule (once finalized), the PPI Order and PPI Memorandum are not appealable as of right, nor should the Court grant the Motions for Leave to Appeal. To the extent the Court finds, however, that the PPI Order and PPI Memorandum are appealable as of right or grants the Trade Committee and/or Mizuho leave to appeal, BOKF respectfully requests it be allowed to participate in the appeal.

5. BOKF further states that it is filing this notice of appeal and statement of election (“BOKF’s Notice of Appeal”) to preserve its right to appeal the PPI Memorandum and PPI Order. BOKF is not seeking to prosecute an appeal of the PPI Order as a sole appellant at this time; however, BOKF must be permitted to participate in any appeal that goes forward, consistent with its role as the indenture trustee for \$17.525 billion of the Senior Notes. Thus, to the extent the District Court agrees that appeal of the PPI Order is appropriate at this time, BOKF respectfully submits that it be permitted to participate in that appeal in its capacity as indenture trustee for the Senior Notes.

6. The names of all parties to the PPI Order and PPI Memorandum other than BOKF, and the names, addresses, and telephone numbers of their respective attorneys, are:

Party	Attorney
Debtors	WEIL, GOTSHAL & MANGES LLP Stephen Karotkin (<i>pro hac vice</i>) Ray C. Schrock, P.C. (<i>pro hac vice</i>) Jessica Liou (<i>pro hac vice</i>) Theodore E. Tsekerides (<i>pro hac vice</i>) 767 Fifth Avenue New York, NY 10153 Tel: (212) 310-8000

Party	Attorney
	KELLER & BENVENUTTI LLP Tobias S. Keller (SBN 151445) Peter J. Benvenutti (SBN 60566) Jane Kim (SBN 298192) 650 California Street, Suite 1900 San Francisco, CA 94108 Tel: (415) 496-6723
Certain PG&E Shareholders	JONES DAY Bruce S. Bennett (SBN 105430) Joshua M. Mester (SBN 194783) James O. Johnston (SBN 167330) 555 South Flower Street, Fiftieth Floor Los Angeles, CA 90071 Tel: (213) 489-3939
Official Committee of Unsecured Creditors	MILBANK LLP Gregory A. Bray (SBN 115367) Thomas R. Kreller (SBN 161922) 2029 Century Park East, 33rd Floor Los Angeles, CA 90067 Tel: (424) 386-4000 MILBANK LLP Dennis F. Dunne (<i>pro hac vice</i>) Samuel A. Khalil (<i>pro hac vice</i>) 55 Hudson Yards New York, NY 10001 Tel: (212) 530-5000
Ad Hoc Committee of Senior Unsecured Noteholders	AKIN GUMP STRAUSS HAUER & FELD LLP Michael S. Stamer (<i>pro hac vice</i>) Ira S. Dizengoff (<i>pro hac vice</i>) David H. Botter (<i>pro hac vice</i>) Abid Qureshi (<i>pro hac vice</i>) One Bryant Park New York, New York 10036 Tel: (212) 872-1000 Fax: (212) 872-1002 AKIN GUMP STRAUSS HAUER & FELD LLP Ashley Vinson Crawford (SBN 257246) 580 California Street Suite 1500 San Francisco, CA 94104 Tel: (415) 765-9500 Fax: (415) 765-9501
Mizuho Bank, Ltd. In its capacity as Holdco Term Loan	STROOCK & STROOCK & LAVAN LLP Mark A. Speiser (<i>pro hac vice</i>)

Party	Attorney
Administrative Agent	<p>Kenneth Pasquale (<i>pro hac vice</i>) Sherry J. Millman (<i>pro hac vice</i>) Harold A. Olsen (<i>pro hac vice</i>) 180 Maiden Lane New York, NY 10038 Tel: (212) 806-5400</p> <p>STROOCK & STROOCK & LAVAN LLP David W. Moon (SBN 197711) 2029 Century Park East Los Angeles, CA 90067 Tel: (310) 556-5800</p>
Ad Hoc Committee of Holders of Trade Claims	<p>GIBSON, DUNN & CRUTCHER LLP David M. Feldman (<i>pro hac vice</i>) Matthew K. Kelsey (<i>pro hac vice</i>) 200 Park Avenue New York, NY 10166 Tel: (212) 351-4000 Fax: (212) 351-4035</p> <p>GIBSON, DUNN & CRUTCHER LLP Matthew D. McGill (<i>pro hac vice</i>) 1050 Connecticut Avenue, NW Washington, DC 20036 Tel: (202) 955-8500</p> <p>GIBSON, DUNN & CRUTCHER LLP Michael S. Neumeister (SBN 274220) Michelle Choi (SBN 313557) 333 South Grand Avenue Los Angeles, CA 90071 Tel: (213) 229-7000</p>
Wilmington Trust, National Association, in its capacity as Administrative Agent for Holdco Revolver	<p>PILLSBURY WINTHROP SHAW PITTMAN LLP M. David Minnick (SBN 54148) Four Embarcadero Center, 22nd Floor San Francisco, CA 94126 Tel: (415) 983-1000</p> <p>PILLSBURY WINTHROP SHAW PITTMAN LLP Leo T. Crowley (<i>pro hac vice</i>) 31 West 52nd Street New York, NY 10019-6131 Tel: (212) 858-1000</p>
Citibank, N.A., as Administrative Agent for the Utility Revolving Credit Facility	<p>DAVIS POLK & WARDWELL LLP Timothy Graulich (<i>pro hac vice</i>) David Schiff (<i>pro hac vice</i>)</p>

Party	Attorney
	<p>Daniel E. Meyer (<i>pro hac vice</i>) 450 Lexington Avenue New York, New York 10017 Tel: (212) 450-4000</p> <p>DAVIS POLK & WARDWELL LLP Andrew D. Yaphe (SBN 274172) 1600 El Camino Real Menlo Park, California 94025 Tel: (650) 752-2000</p>
Canyon Capital Advisors LLC	<p>QUINN EMANUEL URQUHART & SULLIVAN, LLP Bennett Murphy (SBN 174536) 865 South Figueroa Street, 10th Floor Los Angeles, CA 90017 Tel: (213) 443-3000</p>
Consolidated Edison Development, Inc.	<p>TROUTMAN SANDERS LLP Hugh M. McDonald (<i>pro hac vice</i>) Jonathan D. Forstot (<i>pro hac vice</i>) 875 Third Avenue New York, NY 10022 Tel: (212) 704-6000</p> <p>TROUTMAN SANDERS LLP Marcus T. Hall (SBN 206495) Katharine L. Malone (SBN 290884) 3 Embarcadero Center, Suite 800 San Francisco, CA 94111 Tel: (415) 477-5700</p>
Ad Hoc Group of Subrogation Claim Holders	<p>WILLKIE FARR & GALLAGHER LLP Matthew A. Feldman (<i>pro hac vice</i>) Joseph G. Minias (<i>pro hac vice</i>) Benjamin P. McCallen (<i>pro hac vice</i>) 787 Seventh Avenue New York, NY 10019 Tel: (212) 728-8000</p> <p>DIEMER & WEI LLP Kathryn S. Diemer (SBN 133977) 100 West San Fernando Street, Suite 555 San Jose, CA 95113 Tel: (408) 971-6270</p>

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2 DATED: March 5, 2020
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AREN'T FOX LLP

/s/ *Aram Ordubegian*
ARAM ORDUBEGIAN
ANDREW I. SILFEN
BETH M. BROWNSTEIN

*Counsel for BOKF, NA, in its capacity as
Indenture Trustee for the Utility Senior
Notes*

Exhibit A

Entered on Docket
February 06, 2020
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: February 6, 2020



DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re:

PG&E CORPORATION,

- and -

PACIFIC GAS AND ELECTRIC COMPANY,)

Debtors.

) Bankruptcy Case

) No. 19-30088-DM

)

) Chapter 11

) Jointly Administered

) Date: February 4, 2020

) Time: 10:00 AM

) Place: Courtroom 17

450 Golden Gate Ave.

16th Floor

San Francisco, CA

Affects PG&E Corporation

)

Affects Pacific Gas and

Electric Company

Affects both Debtors

* All papers shall be filed in)
the Lead Case, No. 19-30088 (DM).)

INTERLOCUTORY ORDER REGARDING POSTPETITION INTEREST

On December 30, 2019, the court issued a Memorandum

Decision Regarding Postpetition Interest (Dkt. No. 5226). For reasons stated on p. 17 of the memorandum, the court deferred issuing an appealable order at that time. Since then, the disputed and somewhat related issue described by all parties as the Make-Whole issue has been tentatively resolved without a decision by the court. For that reason, the court believes an

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order on the postpetition interest issue is appropriate at this time.

3 Parties adverse to the Debtors on the postpetition interest
4 issue have disagreed on what the court should do now. One
5 group, the Ad Hoc Committee of Holders of Trade Claims, wants a
6 certification that the court's decision and ensuing order is
7 final under Fed. R. Civ. P. 54(b), incorporated via Fed. R.
8 Bank. P 7054 and a direct certification of such an order or an
9 interlocutory order to the court of appeals under 28 U.S.C. §
10 158(d)(2). The other group, the Ad Hoc Committee of Senior
11 Unsecured Noteholders, wants the court to defer any action until
12 it confirms Debtors' Plan of Reorganization under 11 U.S.C. §
13 1141, thus making the underlying decision on postpetition
14 interest final for all purposes.

15 The court has considered the arguments of both sides, and
16 the somewhat neutral position of the Debtors at a hearing on
17 February 4, 2020. Under the circumstances, the court decides
18 not to adopt either sides' position and to leave the question of
19 dealing with an interlocutory order for another court if there
20 is an appeal.

21 Accordingly, and as an interlocutory order, the court
22 concludes that the Debtors are correct, that *In re Cardelucci*,
23 285 F.3d 1231 (9th Cir. 2002) controls and that the
24 Federal Interest Rate applies to the postpetition treatment of
25 unsecured creditors under any Chapter 11 Plan of Reorganization
26 proposed by Debtors.

END OF INTERLOCUTORY ORDER

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Exhibit B

Signed and Filed: December 30, 2019

Lewis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case
PG&E CORPORATION,) No. 19-30088-DM
)
) Chapter 11
- and -)
) Jointly Administered
PACIFIC GAS AND ELECTRIC COMPANY,)
)
) Debtors.) Date: December 11, 2019
)) Time: 10:00 AM
)) Place: Courtroom 17
 Affects PG&E Corporation) 450 Golden Gate Ave.
 Affects Pacific Gas and) 16th Floor
 Electric Company) San Francisco, CA
 Affects both Debtors)
)
* All papers shall be filed in)
the Lead Case, No. 19-30088 (DM).)

MEMORANDUM DECISION REGARDING POSTPETITION INTEREST

I. INTRODUCTION

On December 11, 2019, the court heard oral argument on the discrete legal issue of the applicable postpetition interest to be paid to four classes of allowed unsecured and unimpaired claims, under any chapter 11 reorganization plan for solvent debtors PG&E Corporation and Pacific Gas and Electric Company ("Debtors"). The Debtors, joined by certain Shareholders, argue that creditors in all four classes should receive interest

- 1 -

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1 calculated pursuant to 28 U.S.C. § 1961(a) (the "Federal
2 Interest Rate") in effect as of the petition date (January 29,
3 2019) these chapter 11 cases. That rate for these jointly
4 administered cases is 2.59 percent. Debtors contend that use of
5 the Federal Interest Rate is consistent with *In re Cardelucci*,
6 285 F.3d 1231 (9th Cir. 2002) ("Cardelucci"), which holds that
7 unsecured creditors in a solvent case should receive
8 postpetition interest calculated at the Federal Interest Rate.

9 Several parties, including the Official Committee of
10 Unsecured Creditors, the Ad Hoc Committee of Senior Unsecured
11 Noteholders, the Ad Hoc Committee of Holders of Trade Claims and
12 others (collectively "Unsecured Creditors") oppose the motion.
13 They urge application of various rates, generally determined by
14 applicable contracts between the Debtors and the respective
15 claimants, judgment rates or some other rate.

16 For the following reasons, the court concludes that the
17 Debtors are correct, that *Cardelucci* controls and that the
18 Federal Interest Rate applies to any Plan.

19 II. APPLICABLE LAW

20 Statutory construction of the Bankruptcy Code¹ is "a
21 holistic endeavor" requiring consideration of the entire
22 statutory scheme. *United Sav. Ass'n of Texas v. Timbers of*
23 *Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626,
24 98 L.Ed.2d 740 (1988), cited by *In re BCE West, L.P.*, 319 F.3d
25 1166, 1171 (9th Cir. 2003).

26
27
28

¹ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 In *Timbers*, the Supreme Court utilized this holistic
2 approach to analyze five seemingly unconnected provisions of
3 Title 11 in determining that oversecured creditors are entitled
4 to receive postpetition interest. Applying a similar holistic
5 approach, this court has looked to the structure of the
6 Bankruptcy Code and the purposes behind its many parts to
7 conclude while unsecured creditors are entitled to postpetition
8 interest in a solvent estate, the Bankruptcy Code requires
9 application of the Federal Interest Rate to those claims and
10 that such an application does not impair these claims. Even if
11 *Cardelucci* were not binding, the court would reach the same
12 conclusion.

13 Chapter 5, subchapter I ("Creditors and Claims") of the
14 Bankruptcy Code sets forth the guiding principles for filing and
15 allowance of claims or interests, administrative expenses,
16 determination of secured status and other provisions not
17 important to the current analysis. In contrast, the court must
18 apply the critical provisions of chapter 11, subchapter II ("The
19 Plan"). Section 1123(a) states what a plan "shall" do or
20 include. Section 1123(b) states what a plan "may" do or
21 include. As a definitional matter, section 1124 explains that a
22 class of claims or interest is impaired unless the plan leaves
23 certain legal, equitable and contractual rights unaltered (§
24 1124(1)), or cures, restates, or compensates the rights of class
25 or interest members (§ 1124(2)(A)-(E)).

26 The structure of the Bankruptcy Code and the applicability
27 of these definitional and empowering sections, therefore,
28 dictate rights that are fixed as of the petition date and what

1 rules apply after that. Nothing suggests that, absent specific
2 rules, provisions dealing with prepetition entitlements carry
3 over postpetition. For example, section 502(b)(2) clearly
4 provides that a claim for "unmatured interest"² may not be
5 allowed. An exception to the rule is found in section 506(b)
6 that permits accrued interest to be allowed as long as the
7 security is "greater than the amount of such claim."

8 The Unsecured Creditors' argument that somehow the
9 definitions and remedies found in section 1124 override the
10 plain impact of section 502(b)(2) is simply not persuasive and
11 would require the court to ignore not only the plain words of
12 the statute but also the holistic notion of treating them as
13 part of a combined comprehensive instrument of definitions,
14 applicability and implementation. Section 1124(1) describes
15 what claims are unimpaired and section 1124(2) describes what is
16 necessary for a plan to "unimpair" impaired claims. In
17 contrast, chapter 5 ("Creditors and Claims") dictates how claims
18 and interests are dealt with in the substantive chapters: 7, 11,
19 12 and 13. The subparts of section 502(b) list nine specific
20 rules for affecting allowed claims.

21 An example not directly related to this case proves the
22 point. Section 502(b)(4) disallows the claim of an insider or
23 an attorney to the extent it exceeds the reasonable value of the
24 services. Unsecured Creditors could not persuade the court or
25 even make a convincing argument that somehow an insider or an
26 attorney whose asserted claim exceeds a reasonable value could

27

² No one has suggested that "unmatured interest" means
28 anything other than "postpetition interest."

1 take refuge in section 1124((1)'s definitional provision and
2 escape the clear intention of Congress to limit unreasonable
3 claims for services in the same manner it has limited
4 postpetition unsecured claims for unmatured interest. For the
5 same reason, underlying non-bankruptcy law must give way to
6 contrary provisions of the Bankruptcy Code. *Travelers Cas. &*
7 *Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 444
8 (2007) (quoting *Raleigh v. Illinois Dept. of Revenue*, 530 U.S.
9 15, 20 (2000).

10 With that background, the court turns to the applicability
11 of *Cardelucci* and its clear message.

12 III. THIS COURT'S RESPONSIBILITY UNDER STARE DECISIS

13 This court is bound by the Ninth Circuit's *Cardelucci*
14 decision unless it can be distinguished or overruled:

15 Courts are bound by the decisions of higher courts
16 under the principle of *stare decisis*. The doctrine
17 derives from the maxim of the common law, "Stare
decisis et non quieta movere," which literally means,
18 "Let stand what is decided, and do not disturb what is
settled." See 1B Jeremy C. Moore et al., *Moore's*
19 *Federal Practice ¶ 0.402[1]* (2d ed. 1992). *Moore's*
treatise describes the rule as follows:
20

21 The rule, as developed in the English law,
22 is that a decision on an issue of law
23 embodied in a final judgment is binding on
the court that decided it and such other
courts as owe obedience to its decisions, in
all future cases. *Id.*
24

25 Under this principle a decision of a circuit court of
appeal is binding on all lower courts in the circuit,
26 including district courts and bankruptcy courts
(absent a contrary United States Supreme Court
27 decision). *Zuniga v. United Can Co.*, 812 F.2d 443, 450
(9th Cir. 1987).
28

1 This is true even if there is a split of opinion
2 between the controlling circuit and another circuit
3 court of appeals, and the lower court believes that
4 the controlling circuit court is in error. *Zuniga*,
5 812 F.2d at 450; *Hasbrouck v. Texaco, Inc.*, 663 F.2d
6 930, 933 (9th Cir. 1981)[.]

7 In re Globe Illumination Co., 149 B.R. 614, 617 (Bankr. C.D.
8 Cal. 1993) (multiple internal citations omitted).

9 *Cardelucci* is a published panel opinion by the Court of
10 Appeals for the Ninth Circuit. It is binding on this court.
11 *State Farm Fire & Cas. Ins. Co. v. GP West, Inc.*, 2016 WL
12 3189187, 90 F. Supp.3d 1003, 1018 (D. Haw. 2016) (citation and
13 internal quotation marks omitted). See *Lair v. Bullock*, 798 F.3d
14 736, 747 (9th Cir. 2015) ("[W]e are bound by a prior three-judge
15 panel's published opinions,") (citing *Miller v. Gammie*, 335
16 F.3d 889, 892-93 (9th Cir. 2003) (en banc)).

17 IV. THE HOLDING OF CARDELUCCI

18 In *Cardelucci*, the Ninth Circuit framed the issue before it
19 as follows:

20 This appeal presents the narrow but important
21 issue of whether such post-petition interest is
22 to be calculated using the (federal judgment
23 rate) or is determined by the parties' contract
24 or state law.

25 *Cardelucci*, 285 F.3d at 1231.

26 The Ninth Circuit held that in chapter 11 cases involving
27 solvent debtors, unsecured creditors are entitled to
28 postpetition interest at the federal judgment rate, not at not

1 at contractual or state statutory rates. *Id.* at 1234. In so
2 holding, the Ninth Circuit observed that application of the
3 lower federal judgment rate did not violate an unsecured
4 creditor's substantive due process rights (*id.* at 1236) and that
5 utilization of federal judgment rate for all claims was
6 rationally related to legitimate interests in efficiency,
7 fairness, predictability, and uniformity within bankruptcy
8 system. *Id.*

9
10 While the court pinpointed a "narrow but important
11 issue," it did not narrow the application of its holding,
12 which must be applied broadly given the structure of the
13 Bankruptcy Code and the clear and plain meaning of its
14 applicable provisions, as noted above.
15

16 In *Cardelucci*, the debtor and his opponents, holders of a
17 state court judgment, set aside various differences and thereby
18 permitted confirmation to proceed subject to a reservation of
19 rights concerning the applicable postpetition interest rate.³
20 The Ninth Circuit concluded that the reference by Congress to
21 "the legal rate" in section 726(a)(5) was intentional, in that
22
23

24 ³ While the opinion is silent on the specifics of that
25 debtor's plan, the opponents' claim was impaired for reasons not
26 relevant to this analysis. In the present case the Unsecured
27 Creditors' claims are unimpaired. The Unsecured Creditors put
28 the cart before the horse when they contend that the application
of the "fair and equitable" test of section 1129(b) determines
that their claims are impaired under section 1124.

1 Congress had rejected proposed language of "interest on claims
2 allowed." *Cardelucci*, 285 F.3d at 1234. The court also
3 emphasized that a single, easily determined rate for all
4 postpetition interest ensures equitable treatment of creditors.⁴
5 Although *Cardelucci* was a chapter 11 case, the reference to
6 section 726(a)(5) was critical. Without that reference, the
7 court would be compelled by section 502(b)(2) to allow claims
8 "except to the extent that . . . (2) such claim is for unmatured
9 interest."⁵ There is no specific provision in chapter 11 that
10 allows any interest on unsecured claims.⁶ Without that
11 reference, Unsecured Creditors would be left with no allowed
12 postpetition interest.

13
14 The rule in the seventeen years since *Cardelucci* is clear:
15 unsecured creditors of a solvent debtor will be paid the Federal
16 Interest Rate whether their prepetition contracts call for
17 higher or lower rates, or applicable state law judgment rates
18
19

20
21 ⁴ In this case, given the vast array of creditors' claims, the
22 equal application of such uniform policy is all the more
compelling.

23 ⁵ The exception found in section 506(b) for secured claims has
24 no bearing here.

25 ⁶ The court rejects the argument by the Ad Hoc Committee of
26 Holders of Trade Claims that section 103(b) precludes
27 consideration of section 726(a)(5). *Cardelucci* merely compared
28 the chapter 7 outcome (apply the Federal Interest Rate) as part
of the "best interest" test of Section 1129(a)(9) to compare
whether creditors do better in chapter 7 or chapter 11.

1 are higher, or there are no other applicable rates to consider.
2 Nor is that rule limited to impaired claims. *Cardelucci* is
3 unequivocal and articulates several reasons for broad
4 application of its holding despite the recognition of the narrow
5 issue presented:

- 6 1. The use of the term "legal rate" indicates the Congress
7 intended the single source to be statutory because of the
8 common use of the term when the Bankruptcy Code was
enacted.
- 9 2. Using the federal rate promotes uniformity within federal
10 law.
- 11 3. The analogous post-judgment interest entitlement
12 compensates for being deprived of compensation for the
loss of time between ascertainment of damages and
13 payment.
- 14 4. Application of a single, easily determined rate ensures
15 equitable treatment of creditors.
- 16 5. With a uniform rate, no single creditor will be eligible
17 for a disproportionate share of the remaining assets.

18 *Cardelucci*, 285 F.3d at 1235-1236.

19 The Unsecured Creditors refer to the opinion's "parting
20 note" to support their cause. The actual conclusion rejects a
21 substantive due process argument that has not been developed
here for good reasons. To this court, the "parting note" that
22 dooms their cause is in the penultimate paragraph, and bears
23 repeating:

24 The Court recognizes that these two interests,
25 fairness among creditors and administrative
26 efficiency, may be of limited relevance in certain
bankruptcy proceedings. Where there are only a few
27 unsecured creditors seeking post-petition interest and
there are sufficient assets to pay all claims for all
28

1 interest (sic), there will be no concerns regarding
2 equity among creditors or practicality. In those
3 instances, a debtor may receive a windfall from the
4 application of a lower federal interest rate to an
5 award of post-petition interest. Nonetheless 'interest
6 at the legal rate' is a statutory term with a
7 definitive meaning that cannot shift depending on the
8 interests invoked by the specific factual
9 circumstances before the court. See *In re Thompson*, 16
10 F.3d 576, 581 (4th Cir. 1994).

11 *Cardelucci*, 285 F.3d at 1236.

12 Unsecured Creditors' reliance on older cases invoking the
13 "absolute priority" rule in defense of postpetition interest at
14 the contract rate are unavailing. *Consolidated Rock Products*
15 *Co. v. Du Bois*, 312 U.S. 510 (1941), was decided under the
16 former Bankruptcy Act and is of questionable viability now that
17 the Bankruptcy Code includes sections 726(a)(5) and 502(b)(2).
18 Similarly, *Debentureholders Protective Committee of Continental*
19 *Inv. Corp. v. Continental Inv. Corp.*, 679 F.2d 264 (1st Cir.
20 1982), was decided under Chapter X of the former Bankruptcy Act
21 and thus offers no guidance here.

22 The Ninth Circuit's decision in *L&J Anaheim Associates v.*
23 *Kawasaki Leasing International, Inc.* (*In re L&J Anaheim*
24 *Associates*), 995 F.2d 940 (9th Cir. 1993) does not change the
25 outcome. *L&J Anaheim* was decided only a few months after
26 *Cardelucci* and did not cite it, as it addressed an altogether
27 different issue.

28 In *L&J Anaheim*, a secured creditor filed a chapter 11 plan
that was opposed by the debtor. In order to achieve the
statutory requirement for at least one impaired class, the
creditor, Kawasaki, proposed changing its own state law remedies

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1 following debtor's breach. It eliminated its right to exercise
2 various remedies under the California Uniform Commercial Code,
3 replacing those entitlements under its proposed plan with a
4 requirement that its collateral and a related lawsuit be sold at
5 public auction under procedures mandated by the Bankruptcy Code.

6 In determining that Kawasaki's rights were altered, and
7 thus its claim was impaired, the court stated:

8 At first blush the idea that an improvement in ones'
9 position as a creditor might constitute 'impairment'
seems nonsensical."

10 *L & J Anaheim*, 995 F.2d at 942.

11 The court examined the term of art adopted by Congress to
12 replace language in the prior Bankruptcy Act and concluded that
13 section 1124 created certainty in determining whether or not a
14 creditor was impaired. Once again, section 1124 is
15 definitional, describing improvement in the context of the plan
16 presented as impairment. The court had no occasion to address
17 whether, for an impaired class, postpetition interest was even
18 relevant.

19 Of importance here is that the plan's own language altered
20 Kawasaki's rights; in the present case, the Bankruptcy Code, and
21 not the Plan, is what causes Unsecured Creditors to have their
22 postpetition interest limited to the Federal Judgment Rate. The
23 Plan is not the culprit.

24 A few months after *Cardelucci*, the Ninth Circuit decided
25 *Platinum Capital, Inc. v. Sylmar Plaza, L.P.* (*In re Sylmar*
26 *Plaza, L.P.*, 314 F.3d 1070 (9th Cir. 2002)). There, the court
27 addressed whether or not a plan proponent had proposed the plan
28

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1 in good faith under section 1129(a)(3) when its sole purpose was
2 to enable the debtors to cure and reinstate an obligation. At
3 that time, *Great W. Bank & Trust v. Entz-White Lumber and*
4 *Supply, Inc.* (*In re Entz-White Lumber and Supply, Inc.*), 850
5 F.2d 1338 (9th Cir. 1988), was good law. Under *Entz-White*, plan
6 proponents were permitted to cure defaults under former section
7 1124(3), leaving the objecting creditor not impaired under
8 section 1124. Perhaps predicting the crucial distinction
9 between what a plan does and what the Bankruptcy Code does, the
10 *Sylmar Plaza* court rejected the argument that a plan lacks good
11 faith when it permits owners of a solvent debtor to avoid paying
12 postpetition interest at the default interest rate. The fact
13 that a creditor's contractual rights are adversely affected does
14 not by itself warrant a bad faith finding. Quoting the
15 bankruptcy court in *In re PPI Enters. (US)*, 228 B.R. 339
16 (Bankr. D. Del. 1998), the court stated:

17 In enacting the Bankruptcy Code, Congress made a
18 determination that an eligible debtor should have the
19 opportunity to avail itself of a number of Code
provisions which adversely altered creditors'
contractual and non bankruptcy rights
20

21 The fact that a debtor proposes a plan which it avails
itself of an applicable Code provision does not
constitute evidence of bad faith.
22

23 *Sylmar Plaza*, 314 F.3d at 1075 (citations omitted).

24 Cases cited by the *Sylmar Plaza* creditor to support a per
se rule were distinguishable in that neither adopted or approved
25 such a rule and, moreover, ". . . because none involved an
objection to a plan by an unimpaired creditor." *Id.*
26
27

28

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1 At oral argument counsel for one of the Unsecured Creditors
2 argued that *Cardelucci* has been superseded by *In re New*
3 *Investments, Inc.*, 840 F.3d 1137 (9th Cir. 2016). That argument
4 is unavailing. The *New Investments* decision concludes that the
5 1994 amendments to section 1124 abrogated the holding of *Entz-*
6 *White* that default interest rates could be eliminated by curing
7 defaults under a plan. The decision does not even mention
8 postpetition interest or *Cardelucci* and does not deal with
9 unimpaired claims under section 1124(1) and thus is of no
10 bearing on the issue presented or the outcome here.

11 V. IMPAIRED OR UNIMPAIRED CLAIMS ARE TREATED ALIKE

12 Unsecured Creditors attempt in vain to escape *Cardelucci*'s
13 impact by arguing that, unlike the impaired claim there, their
14 claims will be unimpaired under a plan. The court rejects
15 Unsecured Creditors' argument.

16 First, *Cardelucci*, in answering the narrow question, drew
17 no distinction as to whether the rule it announced was confined
18 only to impaired claims. The clear and unequivocal analysis
19 based on section 726(b)(5) is obvious: it applies to all
20 unsecured and undersecured claims in a surplus estate.

21 Second, no plan compels the payment of the Federal Interest
22 Rate. Rather, the Bankruptcy Code does. A similar analysis was
23 applied very recently by the Fifth Circuit in *In re Ultra*
24 *Petroleum Corporation*, ___ F.3d ___, 2019 WL 6318074 (November
25 26, 2019). There, the court contrasted the treatment of
26 creditors' claims outside of bankruptcy and whether the plan
27 itself was a source of limitation on their legal, equitable and
28 contractual rights, or rather the Bankruptcy Code. The court

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1 looked to the language of section 1124(1), defining not impaired
2 when the plan ". . . leaves unaltered [the claimant's] legal,
3 equitable and contractual rights." The court ruled that a claim
4 is impaired only if the plan itself does the altering, not what
5 the Bankruptcy Code does.

6 *Ultra Petroleum* agreed with the only other court of appeals
7 decision to draw the distinction between what a plan might do
8 and what the Bankruptcy Code does do. *In Sollow v. PPI*
9 *Enterprises (U.S.) Inc. (In re PPI Enterprises (U.S.) Inc.)*, 324
10 F.3d.197 (3d Cir. 2003) the court upheld confirmation of a plan
11 notwithstanding a limitation on an objecting landlord's
12 statutorily capped damages under section 502(b)(6). It held that
13 where section 502(b)(6) alters a creditor's non-bankruptcy
14 claim, there is no alteration of the claimant's "legal,
15 equitable and contractual rights" for purposes of impairment
16 under section 1124(1). *Id.* at 203.

17 The *PPI Enterprises* court agreed with the bankruptcy
18 court's analysis in *In re American Solar King Corp.*, 90 B.R. 808
19 (Bankr. W.D. Tex. 1988) where the bankruptcy court made the
20 following very thoughtful observation:

21 A closer inspection of the language employed in
22 [s]ection 1124(1) reveals 'impairment by statute to be
23 an oxymoron.' Impairment results from what the plan
24 does, not what the statute does. A plan which 'leaves
25 unaltered' the legal rights of a claimant is one which
26 by definition, does not impair the creditor. A plan
27 which leaves a claimant subject to other applicable
28 provisions of Bankruptcy Code does no more to alter a
claimant's legal rights than does a plan which leaves
a claimant vulnerable to a given state's usury laws or
to federal environmental laws. The Bankruptcy Code
itself is a statute which, like other statutes, helps

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1 to define the legal rights of person's, just as surely
2 as it limits contractual rights. Any alteration of
3 legal rights is a consequence not of the plan but of
4 the bankruptcy filing itself.

5 *American Solar*, 90 B.R. at 819-20.

6 The *Ultra Petroleum* court noted that decisions from
7 bankruptcy courts across the country have reached the same
8 conclusion, agreeing that impairment results from what a plan
9 does, not from what a statute does. Its conclusion reinforces
10 the point:

11 We agree with *PPI*, every reported decision identified
12 by either party, and Collier's treatise. Where a plan
13 refuses to pay funds disallowed by the Code, the Code
14 - not the Plan - is doing the impairing.

15 *Ultra Petroleum*, 2019 WL 6318074 at *5.

16 Like the creditors in *Ultra Petroleum*, the Unsecured
17 Creditors' complaint is with Congress and the Bankruptcy Code,
18 not the drafters of a Plan. The Bankruptcy Code, not the Plan,
19 limits them to the Federal Interest Rate.⁷ The cases cited by
20 Unsecured Creditors do not apply here, as the rights in those
21 cases were impaired by the plan and not by operation of law. See
22 *Acequia, Inc. v. Clinton (In re Acequia)*, 787 F.2d 1352, 1363
23 (9th Cir. 1986) (shareholder voting rights altered by plan); *In*
24 *re Rexford Properties, LLC*, 558 B.R. 352, 368 (Bankr. C.D. Cal
25 2016) (creditor's rights regarding ongoing business altered by
26 plan).

27 There is no point in discussing section 1124(2), as that
28 subsection is not relevant to the treatment of the four not

27 For the same reason, creditors who hold contractual claims
28 calling for interest lower than 2.59% will fare better under the
Plan.

1 impaired classes. Were Debtors to have proposed a treatment of
2 the Unsecured Creditors' claims that cured, reinstated, or
3 reversed any acceleration, then the analysis might be helpful.
4 But because section 1124(1) is the operative section here, that
5 ends the discussion.

6 Because the Plan leaves the Unsecured Creditors' claims not
7 impaired, there is also no need to dwell on whether or not "fair
8 and equitable" principles apply. They do not. Unimpaired
9 Creditors, when treated as dictated by the Bankruptcy Code, are
10 not impaired by the Plan. They are conclusively presumed to
11 have accepted the Plan. Section 1126(f). Section 1129(b) is
12 not available to them.⁸

13 VI. CONCLUSION

14 As a trial court in the Ninth Circuit, this court is bound
15 to follow *Cardelucci* unless, as a matter of principled
16 reasoning, it can be distinguished. No such grounds exist. The
17 1994 amendments to section 1124 predated *Cardelucci*. Thus,
18 whether or not *Cardelucci* addressed the issue is not the point.
19 Its rule is the law of this circuit until altered either by an
20 *en banc* panel, the United States Supreme Court, legislation or
21 some other controlling change in the law.

22 Even were *Cardelucci* not controlling, this court would
23 follow the lead of *PPI* and *Ultra Petroleum* (and the lower court
24 decisions cited by *Ultra Petroleum*), and reject the contention
25

26 ⁸ For this reason, the court rejects as incorrect the
27 bankruptcy court's reliance *In re Energy Future Holdings*, 540
28 B.R. 109 (Bankr. D. Del. 2015) on "equitable principles" to
permit unsecured creditors in a solvent case to recover a
contract rate or such other rate as it deemed appropriate.

of Objecting Creditors that imposition of the Federal Interest Rate impairs them. It is the Bankruptcy Code itself, not any plan provision, that imposes that rate.⁹

4 The court is not concurrently entering an order consistent
5 with this Memorandum Decision as was the case with its recent
6 decision in the Inverse Condemnation action (Dkt. No. 4895).
7 Because of the close relationship between the postpetition
8 interest question and the issues presented in the forthcoming
9 Make-Whole dispute, orders disposing of them both at the same
10 time seems appropriate and efficient. Whether either or both
11 questions should be certified for direct appeal or to treated as
12 final for purposes of Fed. R. Bankr. P. 7054, can be visited
13 later.

14 | ***END OF MEMORANDUM DECISION***

25 ⁹ Ultra Petroleum remanded the case to the bankruptcy court
26 to decide the appropriate Make-Whole amounts, the appropriate
27 postpetition interest rate, and the applicability of the
28 solvent-debtor exception. If the three judges on the Fifth
Circuit panel had been members of the Ninth Circuit, there is no
doubt they would have been bound by *Cardelucci*, thus limiting
the remand to the Make-Whole issue.